STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JYQUEZ JULIUS FREEMAN,

APPELLANT

APPELLATE CASE NO 2018-001891

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge abuse his discretion when, after the State and the Defense rested, he removed Juror #107 for an unintentional failure to disclose a relationship to a potential witness when the State, as the party moving to remove the juror, failed to show bias because the witness was not present during *voir dire*, the juror knew the witness by another name, the juror did not know the witness was related to Appellant and the witness was not called to testify?

2. Did the trial judge abuse his discretion in refusing to grant a mistrial when an investigator improperly implied that Appellant was involved in other armed robberies?

STATEMENT OF THE CASE

On September 29, 2017, the Spartanburg County Grand Jury indicted Appellant, Jyquez Julius Freeman, for murder, armed robbery, possession of a weapon during the commission of a violent crime, and four counts of kidnapping. R. p. 391. On October 8, 2018, Appellant proceeded to jury trial before the Honorable J. Derham Cole. Michael D. Morin represented Appellant at trial. Solicitor Barry Joe Barnette prosecuted the case. The jury returned verdicts of guilty as charged. Judge Cole sentenced Appellant to forty (40) years for murder, thirty (30) years concurrent for armed robbery, five (5) years concurrent for the weapons charge and thirty (30) years concurrent for each count of kidnapping. A timely notice of intent to appeal was served on October 12, 2018. This appeal follows.

STANDARD OF REVIEW

Removal of Juror

When a juror's *voir dire* nondisclosure is unintentional the trial judge "may exercise discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014).

Mistrial

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." Id. At 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted).

ARGUMENTS

1. **The trial judge abused his discretion when, after the State and the Defense rested, he removed Juror #107 for an unintentional failure to disclose a relationship to a potential witness when the State, as the party moving to remove the juror, failed to show bias because the witness was not present during *voir dire*, the juror knew the witness by another name, the juror did not know the witness was related to Appellant and the witness was not called to testify.**

On March 31, 2017, two men robbed a Kentucky Fried Chicken [KFC] in Spartanburg. One of the men fatally shot the manager. The men were not identified by the other employees of KFC who were present during the robbery. Both men wore masks, gloves, blue bandanas and black jackets. The day after the robbery Richard Behnke called 911 when he found a gun, mask, black jacket and blue bandana near his truck parked in front of his house. (R. pp. 137-138). The items were processed for fingerprints and DNA by the South Carolina Law Enforcement Division [SLED]. According to the DNA analyst from SLED, a DNA profile found on the mask matched Appellant's DNA profile. (R. p. 282, lines 20-21; p. 286, lines 8-15). There was no other forensic evidence linking Appellant to the KFC robbery.

The State told the jury in opening statement that, while both men were armed, the shooter was De'Adrian Garcia, a former KFC employee. (R. p. 66, lines 12-25). In March Appellant had moved into an extra bedroom of the home where Garcia lived with his mother. (R. p. 226, lines 8-25). On April 7, 2017, officers executed a search warrant at the Garcia house. (R. pp. 239-244). The murder weapon was found in Garcia's bedroom. (R. p. 206, lines 8-20; p. 221, lines 10-12). Both Appellant and Garcia were arrested.

During jury qualifications the judge named numerous potential witnesses including Tishiana Lee and Zy'Kerria Wilkins. (R. p. 31, lines 6-8). The judge then asked the potential jurors, "So if you have any connection with anybody who's been identified, please stand so we

can address that connection and whether or not it would affect your judgment in the case." (R. p. 31, lines 9-12). Juror #107 did not stand. (R. pp. 31-35).

On the last day of trial, after the State and the Defense rested, the judge met with the attorneys and Juror #107 in chambers. (R. pp. 310-326). The judge told Juror #107, "The purpose of this morning is simply for me to inquire of you as to whether or not you have any connection with the defendant, Jyquez Freeman, or with his mother or with his girlfriend or with any person who is listed as a potential witness. And those persons include Tishiana Lee, Jayonce Freeman, Jayhova Freeman, Charles Keenan, Zy'Kerria Wilkins or any members of those persons' respective families." (R. p. 311, lines 10-17). The juror denied having a connection to any of the potential witnesses. (R. pp. 312-318). The judge then showed the juror what appears to be a Facebook profile photo of Zy'Kerria Wilkins and the juror denied knowing or having a connection with Wilkins. (R. p. 318, line 24 – p. 319, lines 1-8). The judge then showed the juror an image from Wilkins' Facebook page that included a photo of Juror #107, Deandre Long, as what appears to be a suggested friend, "Add Friend." (R. p. 319, lines 9-21). The profile photo and page image were later marked as Court's Exhibits #6 and #5. Juror #107 told the judge, "That's just saying we're mutual friends on facebook, but I don't know all of my friends on facebook. There's no telling how long – she's from here. You know, a lot of people from here is on my facebook, from Spartanburg that is. But as far as me personally knowing her or any type of conversation, seeing her or anything, I have never seen her, had any of that." (R. p. 319, line 22 – p. 320, lines 1-3). The judge asked, "So is it – am I understanding you think you may have a mutual friend, but you don't know her?" (R. p. 320, lines 4-6). Juror #107 answered, "Yeah. I don't. I personally don't." (R. p. 320, line 7).

The judge then showed Juror #107 an image from the juror's Facebook page that included a photo of Tishiana Lee as what appears to be a suggested friend, "Add Friend." (R. p. 320, lines 8-10). The Juror told the judge, "Yes. That's my – a friend of mine I went to school with. That's his child's mother, and I've never called her by that name, so I didn't know." (R. p. 320, lines 11-13). The juror told the judge that he went to school with Tishiana Lee but did not know her by that name. (R. p. 320, lines 14-20). The juror knew her as "Ti –Tot." (R. p. 321, lines 1-2). Importantly, the juror did not know that Tishiana "Ti –Tot" Lee was Appellant's sister. The judge asked, "And do you know of any connection she has with anybody else that's been identified as a witness or participant in this case?" (R. p. 320, lines 21-23). Juror #107 answered, "No. I don't know that much. Going off that name, going off her picture, that's my son – my friend's, Devin Ross, his son's mother." (R. p. 320, line 24 – p. 321, line 1).

The judge then told Juror #107, "Mr. Long, Tishiana Lee – who you know as Ti – is the sister of Mr. Freeman, and I'm told that when her name was called she was not in the courtroom and she has not been in the courtroom --" (R. p. 321, lines 7-10). The judge then excused the juror stating:

> All right. Well, Mr. Long, based upon that information, I'm going to remove you from the jury. You're going to be excused. But I don't find based upon what you've told me and what I understand, I don't find fault with you simply because you couldn't – she wasn't in the courtroom and you couldn't identify her. But still based on the fact that you know her and she's connected with the defendant, I'm going to remove you from the jury.

(R. p. 322, lines 15-23). The juror did not know that the potential witness, Tishiana "Ti –Tot" Lee, was the Appellant's sister until the judge told him. Lee did not testify at trial. After the judge removed Juror #107, the prosecutor moved to remove the juror and told the judge, "That's correct, Your Honor, based off your interview, we ask for him to be removed, because, obviously, if I had that information beforehand, I would have struck him. And I had strikes left."

(R. p. 324, lines 7-11). Appellant objected to the judge removing Juror #107. (R. p. 324, lines 13-14).

The trial judge erred in replacing Juror #107. The State failed to demonstrate that Juror #107 was potentially biased. The juror did not know that the potential witness was related to the Appellant and the witness did not testify at trial. The juror's slight connection to a potential witness who he did not know was related to Appellant would not have supported a challenge for cause and would not have been a "material factor" in the State's exercise of peremptory strikes. When a juror's *voir dire* nondisclosure is unintentional the trial judge "may exercise discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 246 (2014). The trial judge abused his discretion in removing the juror.

In State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), the South Carolina Supreme Court found that the trial judge abused his discretion in removing a juror who during the trial discovered she was casually acquainted with a witness who testified a trial. In Stone the Court wrote:

> Although the present case does not involve a new trial, Woods[1] is instructive. It is patent here that Juror Thompson's failure to disclose her acquaintance with Perry was innocent. Moreover, we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges. Thompson clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in any way. Accordingly, we hold the trial court abused its discretion in removing her.

350 S.C. at 448–49, 567 S.E.2d at 247–48 (2002). Juror #107 in the present case was removed before he was asked if his slight connection to a potential witness would affect his ability to be fair.

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[1] State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001).

In State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) the South Carolina Supreme Court stated that in order to receive a new trial based on the removal of a juror for an unintentional concealment, there must be a prejudicial abuse of discretion. The Court in Coaxum noted that:

> However, "where the failure to disclose is innocent, no inference of bias can be drawn." Woods, 345 S.C. at 589, 550 S.E.2d at 285. Accordingly, the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias.

410 S.C. at 329, 764 S.E.2d at 246.

In the present case the State, as the party moving to remove the juror, after all of the evidence had been presented, failed to meet the heightened burden to show that Juror #107's unintentional failure to disclose a slight connection to a witness who did not testify at trial indicated bias. Without such a threshold showing, the judge's removal of the juror constitutes a prejudicial abuse of discretion requiring reversal. The fact that the juror was replaced by an impartial alternate does not cure the error when the moving party failed to show bias to justify the removal. To hold otherwise would allow either side to move to replace a juror, at the end of trial, without a showing of bias and possibly based on an improper motive.

2. **The trial judge abused his discretion in refusing to grant a mistrial when an investigator improperly implied that Appellant was involved in the other armed robberies.**

During the trial an officer with the Spartanburg County Sheriff's Office testified on direct examination by the State that, "As a part of this ongoing investigation with the city, we had been out on that night from like midnight up looking for people that were involved in these armed robberies." (R. p. 245, lines 14-16). The prosecutor then asked, "Wait, wait, wait. Involved in the armed robbery of the K.F.C.?" (R. p. 245, lines 17-18). The officer answered, "Yes. It was all in conjunction because the stuff that we had compared as far as the investigations were paralleling each other." (R. p. 245, lines 19-21). Appellant objected. (R. p. 245, line 22). A brief bench conference was held off the record and then the judge sent the jury out.

Outside of the presence of the jury the judge said, "Now that the jury is out, Mr. Barnette, will you make it clear to this witness what case we're trying here today?" (R. p. 246, lines 6-8). The prosecutor responded, "Yes, sir. We're just talking about the one K.F.C. robbery." (R. p. 246, lines 9-10). The officer replied, "Absolutely. Okay." (R. p. 246, line 11). Appellant moved for a mistrial stating, "I understand that, Your Honor, but I'm going to move for a mistrial. He's made reference to other investigations and other robberies twice. Mr. Barnette tried to save him one time, and then he repeated it again." (R. p. 246, lines 12-16).

The judge denied the mistrial motion stating:

> Well, I don't think that's clear. That's – that wasn't clear to me. I understand what your concern is and I understand where I thought he was going. That's why I sent the jury out, but it wasn't clear to me that he was referring to anything other than this one, but I anticipated that he might, and that's the reason I excused the jury. So at this point I don't think it's necessary to grant a motion for a mistrial, and so that motion is denied.

Contrary to the judge's finding, the officer's testimony did not refer to the single armed robbery for which Appellant stood trial. Instead, the officer testified about "armed robberies" and "investigations." The trial judge abused his discretion in refusing to declare a mistrial when the officer twice improperly implied that Appellant was involved in other armed robberies.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b). Id. Even if prior bad act evidence falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Clasby, 385 S.C. at 155, 682 S.E.2d at 896.

The officer's testimony implying that Appellant was involved in other armed robberies constituted impermissible character evidence. The testimony was not relevant in the trial involving the robbery of the KFC and the State did not seek to admit the testimony pursuant to Rule 404(b). The judge abused his discretion in refusing to grant a mistrial based on the improper testimony.

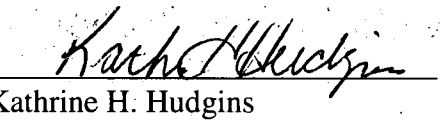
"Although the decision is vested in the sound discretion of the trial court, a mistrial is proper only where it is dictated by 'manifest necessity' or 'the ends of public justice.' Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000) (internal quotations and citations omitted).

A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). An instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced. State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972).

In the present case the improper testimony was not stricken. An instruction to disregard the improper testimony was not requested and no instruction to disregard was given. It is probable that even if an instruction had been given, it would not have cured the prejudice to Appellant. Appellant was prejudiced by the improper testimony. A mistrial was necessary. The improper testimony indicated that Appellant was involved in a string of armed robberies on the same night as the KFC armed robbery for which Appellant stood trial. The testimony is far more prejudicial than the single reference to a warrant in State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (S.C. Ct.App. 2003). The State's evidence implicating Appellant in the KFC robbery was scant. The trial judge erred in refusing to grant a mistrial.

CONCLUSION

Based on the above arguments this Court should reverse the convictions and sentences and remand the case for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

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This 9th day of December, 2019.